Thus, there is a true, direct, intolerable, and irreconcilable conflict between the Tenth Circuit and the District of Columbia Circuit concerning this conclusion and the burden of proof associated therewith.

B. THE CONFLICT BETWEEN THE LEGAL HOLDINGS OF THE TWO CIRCUITS IS MANIFEST AND IRRECONCILABLE.

Respondent's attempt to rewrite the opinion of the District of Columbia Circuit in *Dynalantic* must be rejected. For despite Respondent's assertions that Dynalantic was a "small" business, and therefore able to challenge the race-based presumption of the program, that was not the basis for the District of Columbia Court's holding. In fact, the *Dynalantic* Court went out of its way to reject the assertions of the government that Dynalantic was not an "appropriate plaintiff" because it could not participate in the program.[5] The *Dynalantic* Court could not have been more clear as to its view that the government's argument was "premised on a mischaracterization of Dynalantic's alleged injury. [Dynalantic] has no desire to participate in the 8(a) program." *Id.*, at p. 1016. It is little wonder, therefore, that Respondent totally ignores

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[5] Respondent's assertion (in footnote 6) that it did not have the opportunity to challenge the impact of size on standing in the *Dynalantic* case is incorrect. The District of Columbia Circuit made it clear that the ability of Dynalantic to "qualify for the 8(a) program . . . is wholly irrelevant." *Id.*, at p. 1016. Because the Court rejected the government's assertion that Dynalantic did not have standing because it was not "socially *or* economically" disadvantaged, the Court would have rejected a similar standing argument based on Dynalantic's size. *Id.*

this forthright holding and the direct and irreconcilable conflict it creates with the holding of the Tenth Circuit in *Cache Valley*.[6] This direct and irreconcilable conflict must be resolved by this Court.

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND THE DECISIONS OF THIS COURT.

Respondent's failure to discuss the holding of the *Dynalantic* Court cannot obscure the fact that that decision was based on the holdings of this Court in *Adarand*, *Jacksonville*, and *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). As a result, the Tenth Circuit's decision in *Cache Valley* creates a direct and irreconcilable conflict, not only with District of Columbia Circuit, but also with this Court. This conflict must be resolved by this Court.[7]

Respondent attempts to brush aside that conflict by asserting that this Court's holding in *Adarand* was silent as to the significance of size in challenges such as this. Obviously, to everyone but Respondent and the Tenth

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[6] Just how much of a conflict exists between the Tenth Circuit and the District of Columbia Circuit is obvious from Chief Judge Edwards' dissenting opinion in *Dynalantic*. Chief Judge Edwards' analysis is exactly that adopted by the Tenth Circuit in *Cache Valley*!

[7] Congress all but invited expeditious review by this Court of the TEA-21 program. Among the indicia of that near invitation was the adoption of a provision that any state barred by court order from implementing the race-based provisions of TEA-21 would not lose its federal funds as a result.

Circuit, this Court's holdings in *Bakke*, *Jacksonville*, and *Adarand* made that discussion totally unnecessary. Lest others become as confused as Respondent is on this issue, this Court must grant this Petition to clarify this matter once and for all.[8] Otherwise, the result of what Respondent sees as the Court's silence on this matter will be adoption of a standing rule that is radically different from that adopted in *Bakke* and that has guided the courts for more than 20 years.

CONCLUSION

For all of the above reasons, this Court should grant the Petition of Cache Valley in this matter and review the erroneous decision of the United States Court of Appeals for the Tenth Circuit. Respondents have failed to provide

[8] Similarly confused is Respondent's discussion of the burden as to standing. Federal Respondent's Brief, at p. 18. Respondent carelessly mingles plaintiff's burden to prove standing with the burden to withstand summary judgment. This discussion should not obscure the conflict that exists between the Tenth Circuit and the District of Columbia Circuit and this Court with regard to who has standing to challenge federal race-based contracting programs such as the one at issue in this case. Respondent's assertion that Petitioner is a mere "concerned bystander[ ]" with regard to this program is shameful. [footnote 7]. Petitioner, and other companies like it, continue to suffer constitutional injury and economic hardship as a result of this program.

any compelling reason as to why this petition should not be granted.

Respectfully submitted,

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